

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK  
(BROOKLYN)

**IN RE: EXACTECH POLYETHYLENE  
ORTHOPEDIC PRODUCTS LIABILITY  
LITIGATION**

**MDL No. 3044 (NGG) (MMH)**

**Case No.: 1:22-md-03044-NGG-MMH**

**District Judge Nicholas G. Garaufis  
Magistrate Judge Marcia M. Henry**

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**THIS DOCUMENT RELATES TO: ALL CASES**

**CASE MANAGEMENT ORDER FOR BELLWETHER TRIAL SELECTION PROCESS**

This Court having considered the Parties' Joint Submissions for a Unified Bellwether Trial Plan, and counsel for the Plaintiffs and the Exactech Defendants consenting to the form, substance and entry of this Order, for good cause shown,

It is on this            day of            2023, **ORDERED:**

- 1. The MDL Preliminary Pool.** All knee cases brought on behalf of revised, non-bilateral Plaintiffs where a Plaintiff Fact Sheet has been substantially completed by August 31, 2023, and all knee cases brought on behalf of revised, non-bilateral Plaintiffs which were filed by July 1, 2023 (regardless of Plaintiff Fact Sheet status) shall constitute the group of cases from which the **MDL Preliminary Pool** shall be selected. There are two parts to the **MDL Preliminary Pool: the EDNY Preliminary Pool and the National Preliminary Pool.** A case can be a member of only one of these two pools.
- 2. The EDNY Preliminary Pool.** The **EDNY Preliminary Pool** shall consist of all cases as defined in paragraph 1 where this Court has jurisdiction because the Plaintiff lives in the Eastern District of New York or had implantation or revision surgery within the Eastern District of New York. It shall consist of 12 cases – 8 randomly selected, 2 plaintiff picks and 2 defense picks.
- 3. The National Preliminary Pool.** The **National Preliminary Pool** shall be all other cases as defined in paragraph 1 where a *Lexecon* waiver would be required for trial by the MDL Court. It shall consist of 12 cases – 8 randomly selected, 2 plaintiff picks, and 2 defense picks. As to those cases the parties will have 15 days to advise as to whether they will waive *Lexecon*. If either side refuses to waive *Lexecon* in an individual case, such a refusal will (a) constitute a strike(s) for the other side, or, (b) in the alternative, the opposing side will

receive an additional strike for each non-waiving party, with the party refusing to waive *Lexecon* selecting between alternatives a and b. Further the case for which there is no *Lexecon* waiver will be replaced by the method it came into the pool (e.g. random, plaintiff pick or defense pick).

4. **Excluded Cases.** Non-Revision (plaintiff has an Exactech device but it has not been revised as of August 31, 2023) and Exactech Bilateral (plaintiff has an Exactech device implanted in both the left and right knees) Cases will not be included in the **Preliminary Pool**.
5. **Deadline for Discovery Forms:** The deadline for production of these discovery instruments will be accelerated as follows for the 24 cases in the Preliminary Pool if the standard deadlines have not already passed.
  - a. **Plaintiff Fact Sheet (PFS) Deadline:** The PFS is due for as provided for in the Case Management Order dated April 26, 2023, or 15 days after selection into the **EDNY Preliminary Pool** or the **National Preliminary Pool**, whichever is shorter,
  - b. **Time to Cure Plaintiff Fact Sheet (PFS) Deficiencies:** Cure time for any outstanding deficiencies is 15 days after the deficiency notice is given.
  - c. **Defendant Fact Sheet (DFS) Deadline:** The DFS is due as provided for in the Case Management Order dated April 26, 2023, but if that time has not yet run, then the time remaining from service of the PFS.
  - d. **Time to Cure DFS Deficiencies:** Cure time for any outstanding deficiencies is 15 days after the deficiency notice is served.
6. **Random Sampling.** The parties shall agree on a list of eligible knee cases for bellwether trial consideration within fourteen days of the entry of this Order. The parties shall separately sequentially number the **EDNY Preliminary Pool** list and the **National Preliminary Pool** list, assigning each Plaintiff a unique number, starting with the number 1. At an agreed upon date and time, representative counsel for Plaintiffs and Defendants shall meet in person (or via zoom if the parties agree that the random selection process may be conducted remotely) and use a random number generator to identify the eight (8) randomly selected knee cases in the **EDNY Preliminary Pool** and the eight (8) randomly selected knee cases in the **National Preliminary Pool**. Specifically, the parties will randomly select knee cases using <http://www.random.org> to generate random numbers within the range of unique numbers assigned to the bellwether pool.
7. **EDNY Preliminary Pool Selection.** On **January 8, 2024**, at 4 p.m. eastern, Counsel shall simultaneously exchange the 2 plaintiff picks and 2 defense picks which come from the remaining **EDNY Preliminary Pool**. In the event the parties select any of the same cases, there will be no replacement picks. The parties shall then submit a Joint Notice of Initial EDNY Bellwether Pool which identifies the initial bellwether pool.

8. **Strikes within EDNY Preliminary Pool:** For the 12 cases in the **EDNY Preliminary Pool**, on **January 22, 2024**, at 4 p.m. eastern, the parties shall exercise their strikes; each side gets four strikes, taking the pool down to four. In the event the parties strike the same case(s), there will be no replacement strikes.
9. **National Preliminary Pool Selection.** On **February 8, 2024**, at 4 p.m. eastern, Counsel shall simultaneously exchange the 2 plaintiff picks and 2 defense picks which come from the remaining **National Preliminary Pool**. In the event the parties select any of the same cases, there will be no replacement picks. The parties shall then submit a Joint Notice of Initial National Bellwether Pool which identifies the initial bellwether pool.
10. **Strikes within National Preliminary Pool:** For the 12 cases in the **National Preliminary Pool**, on **February 22, 2024**, at 4 p.m. eastern, the parties shall exercise their strikes; each side gets four strikes, taking the pool down to four. In the event the parties strike the same case(s), there will be no replacement strikes.
11. **Court Selection of Trial Cases:** Parties shall brief the remaining eight cases in the **MDL Preliminary Pool** and submit those briefs to the Court simultaneously on **March 22, 2024**, at 4 p.m. eastern. Thereafter the Court will select two cases from each pool for a total of four cases for trial, including the order of the trials, which will comprise the **Trial Pool**. Following the Court's selection of the **Trial Pool**, case-specific depositions shall commence in accordance with the schedule set forth below in paragraph 13. To the extent the briefing involves plaintiffs' confidential medical information or personal issues the briefing will be submitted under seal.
12. **Addition of Parties and Amendment of Complaints.** After the four bellwether cases are selected for trial, to account for individual facts and law specific to those bellwether cases, bellwether plaintiffs will have 15 days from the date the Court selects their cases for trial to amend their short-form complaints to add claims. Defendants will have 30 days from the date the Court selects the bellwether cases to respond to any additional claims raised by Plaintiffs, to add additional affirmative defenses, and to file any motions to dismiss. The parties shall have 30 days from the date the bellwether cases are selected by the Court to add new parties. By this Order, the deadline to add parties in the First Amended Case Management Order Governing Discovery (Dkt. 400) is hereby stricken.
13. **BELLWETHER CASE DISCOVERY**
  - a. **Plaintiff Supplemental Fact Sheets:** Plaintiffs' Supplemental Fact Sheets are due within 60 days of selection.
  - b. **Core Depositions:** Core Discovery Depositions (plaintiff, spouse/partner, implanting and revising surgeons and up to 3 case specific fact witnesses) shall be completed by **June 30, 2024**.

- c. **Plaintiffs' Trial Pool Expert Report Disclosures:** Plaintiffs shall disclose experts and serve reports for the **Trial Pool** cases on or before **September 30, 2024**.
- d. **Defendants' Trial Pool Expert Report Disclosures:** Defendants shall disclose experts and serve reports for the **Trial Pool** cases on or before **November 30, 2024**.
- e. **Rebuttal Experts:** Rebuttal expert reports are due **December 15, 2024**.
- f. **Plaintiffs' Expert Depositions:** The depositions of plaintiffs' experts disclosed for the **Trial Pool** cases shall be completed on or before **January 15, 2025**.
- g. **Defendants' Expert Depositions:** The depositions of Defendants' experts disclosed for the **Trial Pool** cases shall be completed on or before **February 15, 2025**.
- h. **Remaining Trial Pool Case Discovery:** The Parties agree to submit expert discovery schedules for the remaining Trial Pool cases sixty days prior to the first trial date for the first Trial Pool case.

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Honorable Nicholas G. Garaufis